IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

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Opinions Below

The opinion of Judge Anselm Sodaro of the Criminal Court of Baltimore is not reported. A copy of that opinion is at R. 75.* The opinion of the Court of Appeals of Maryland is reported at 233 Md. 498, 197 A. 2d 232. A copy of that opinion appears at R. 78.

Jurisdiction

The final judgment of the Court of Appeals of Maryland was entered February 10, 1964 (R. 85). This Court noted probable jurisdiction on June 22nd, 1964. (R. 89). The jurisdiction of this Court rests upon 28 U.S.C. §1257(2).

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* "R" refers to Transcript of Record page numbers.

Questions Presented

The state of Maryland has imposed criminal penalties on appellant because he publicly exhibited what the State acknowledged to be an entirely permissible motion picture without purchasing the State's prior approval of the concededly permissible motion picture through submission of the motion picture to the Maryland Motion Picture Censor Board:

1. Has not Maryland, in imposing criminal penalties on the very act of free expression of concededly legitimate matter, directly transgressed the First and Fourteenth Amendments?

2. In seeking to use its criminal processes to coerce appellant:

(A) to purchase from the State the privilege of publicly exhibiting a concededly permissible motion picture, was not Maryland seeking to impose a tax on appellant's exercise of his constitutional right of free expression in contravention of the First and Fourteenth Amendments?

(B) to submit a concededly permissible motion picture to the Motion Picture Censor Board for approval which, the State acknowledges, that Board could not have lawfully withheld, was not Maryland seeking to delay appellant in the immediate exercise of his present right of free expression in contravention of the First and Fourteenth Amendments?

Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question, is Article 66A of the Maryland Code,[1] Sections 2, 6, and 11 of which are as follows:

> "2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this Article called the Board.
>
> "6. (a) The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.
>
> "(b) For the purposes of this Article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

[1] The statute is set forth in full, Appendix A, pp. App. 1 to App. 14, infra.

"(c) For the purposes of this Article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) For the purposes of this Article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

"11. For the examination of each and every one thousand feet (1,000') of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of Three Dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of One Dollar ($1.00) for the approval of every duplicate of one thousand feet (1,000') or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of Two Dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of Two Dollars ($2.00) for each one hundred (100) views or fractional part thereof,

and for the approval of duplicate views or prints thereof a fee of One Dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of One Dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of Section 7 of this Article; and the Board shall account for and pay all fees received by it into the State Treasury."

2. The constitutional provision to which, in appellant's view, the foregoing statutory provisions are repugnant, is Section 1 of the Fourteenth Amendment of the United States.

Statement of the Case

Appellant Ronald Freeman manages the Rex Theatre, in Baltimore (R. 14). On November 1, 1962, appellant telephoned Mrs. Eva Holland, chief reviewer of the Maryland Motion Picture Censor Board, advising her of his intention to exhibit, at the Rex Theatre in the regular course of business, a film—"Revenge at Daybreak"—which had not been submitted to the Board for censorship (R. 7). Mrs. Holland appeared at appellant's theatre that evening and saw "the film . . . exhibited in its entirety" (R. 7). And thereupon, on instruction of the Chairman of the Board, Mrs. Holland secured a warrant for appellant's arrest, which was served on appellant by a Baltimore policeman (R. 12).

Following indictment, appellant was tried in the Baltimore Criminal Court, on March 18, 1963, for the alleged violation of Section 2 of Article 66A of the Maryland Code, which makes it "unlawful to . . . exhibit . . . any motion picture film . . . in the State of Maryland unless the said film has been submitted by the . . . lessee of the film . . . and duly approved and licensed by the . . . [Motion Picture Censor] Board."

In his opening statement counsel for appellant advised Judge Sodaro that "the State purports to have the right under this act [Article 66A] to restrain the right of Mr. Freedman to exercise his constitutional freedoms of speech and press. It is the belief of Mr. Freedman and myself that the Censorship Act is an oppressive act that is unconstitutional under both the Federal and State Constitutions . . ." (R. 4-5).

The State proved, through Mrs. Holland, that appellant had exhibited "Revenge at Daybreak" without submitting it for censorship (R. 7-8). Appellant was not permitted to examine Mrs. Holland on whether the film satisfied the statutory censorship standards, but appellant offered to prove that, had she been permitted to answer, Mrs. Holland would have acknowledged "that the film did not violate any of the standards set forth in this act" (R. 11). Mrs. Holland and her subordinate, Mr. Vaughn, "look at each and every movie . . . that comes in the State of Maryland, with the exception of newsreels . . ." (R. 40). Only if Mrs. Holland and Mr. Vaughn are doubtful about a film is the Board of Censors convened to review it.

Appellant, by calling members of the Motion Picture Censor Board, showed the way in which the Board administers the statutory censorship standards.[2]

Appellant testified that in submitting an average film for censorship, one has to pay a fee of, on the average, some $30 (R. 16). Appellant also showed, through the Board's annual reports, that over the course of the Board's more than 40 years of existence the fees it has collected have exceeded administrative costs by over a half a million dollars, which excess has gone to the Maryland Treasury (R. 62).

The prosecutor advised Judge Sodaro that Maryland did not contend that "Revenge at Daybreak" was obscene or that the Motion Picture Censor Board would not have approved the film had it been submitted (R. 19). At appellant's request, Judge Sodaro himself viewed the film (R. 20), and the film is part of the record in this case (R. 6).

At the close of all the testimony, appellant moved

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[2] For example, appellant's counsel examined Norman Mason, a member of the Board, on the way in which the Board has administered Section 6 (c), which is almost verbatim the same as the section of the New York statute involved in *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, in which the New York ban on the film of "Lady Chatterley's Lover" was set aside (R 32-33):

> Q. You know it involved the same standard, Mr. Mason, having knowledge of the fact that these standards have been knocked out by the United States Supreme Court, have you still continued to employ the use of these same standards in the censoring of films? A. Sir——
>
> (Fol. 55) (Mr. Freeze) Objection.
>
> (The Court) Well, let him answer. Let him answer.
>
> (Witness) Sir, each picture is altogether different. It depends upon the circumstances why certain scenes would be allowed in a picture; and, maybe other circumstances

for a judgment of acquittal (R. 53-54), on the grounds *inter alia*, that Article 66A of the Maryland Code

> . . . violates the First and Fourteenth Amendments of the United States Constitution in that said Article imposes an invalid infringement upon the exercise of the right of free speech and press . . .
>
> . . . is invalid as contrary to the Due Process Clause of the Fourteenth Amendment in that the standards pursuant to which speech is abridged set forth in, more specifically, Section 6 of said Article, are vague and in that these standards fail to advise defendant of those forms of speech which the state purportedly proscribes . . .
>
> . . . is so vague and indefinite in form that it can be interpreted as to permit within the scope of its language the banning of incidents fairly

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possibly it would not be. I mean, each picture has to go on its own. I mean, in other words, you can't very well take one picture and it has been a guide only to a certain degree.

(Question read.)

Q. (Mr. Bilgrey) Is your answer yes? A. No, it isn't yes. Each picture has to stand on its own merits, I mean, rarely do you see two pictures, in fact. I have never seen two pictures identically alike; and, certain parts of a picture tends to make it altogether different than other parts in the picture.

Q. I would still like to get an answer yes or no.

(The Court) Well, the answer to the question is, Mr. (Fol. 56) Mason, as I understand it, knowing these standards have been knocked out by the Supreme Court, do you still use those same standards?

(Witness) No.

(The Court) The answer is no.

Q. (Mr. Bilgrey) What standards do you use if you do not use the standards that are contained in Section 6? What

> within the protection or guarantee of freedom of speech and press and is therefore void as contrary to the Fourteenth Amendment of the United States Constitution and as contrary to the terms of the Maryland Constitution . . .
>
> . . . is invalid in that it imposes a tax and/or a license fee upon the right of the freedoms of speech and press and is thus contrary to the First and Fourteenth Amendments of the United States Constitution. . . .

On May 24, 1963, Judge Sodaro filed a memorandum opinion (R. 75-77) overruling appellant's federal claims and denying his motion for acquittal. Thereupon Judge Sodaro entered a judgment of conviction and fined appellant $25 (R. 2).

Appellant, repeating his federal claims, appealed the judgment of conviction to the Maryland Court of Appeals. On February 10, 1964, the Court of Appeals affirmed the judgment of conviction. 233 Md. 498, 197 Atl. 2d 232. Although expressly noting that the State conceded that "Revenge at Daybreak"

> standards do you use, that is what we are trying to find out. A. With each picture depends solely on itself. No way to make a general answer of that particular question.
>
> Q. You use different standards, then, in connection with your judging of every individual film? A. Any portion of any picture that the Supreme Court has ruled on we try to go by the Supreme Court ruling. I mean, we don't try to overpower those boys, is that what you mean?

Another member of the Board, Mrs. Louis E. Sheeter, testified (R. 46):

> A. I know the ruling that we were familiarized with in our office on Lady Chatterly's [sic] Lover.
>
> A. If the acts of immoral behavior were glamorized or glorified it was still within our rights not to permit them (fol. 83) to pass.

would have been approved had it been submitted for censorship, the Court of Appeals concluded—as had Judge Sodaro below—that the decision in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, ruled the case adversely to appellant's federal claims.

On June 22, 1964, this Court noted probable jurisdiction. 84 S. Ct. 1919.

Summary of Argument

I. Contrary to the view taken by both the courts below, and also by the State in its Motion to Dismiss or Affirm the instant appeal, this case is not controlled by *Times Film Corp.* v. *Chicago,* 365 U.S. 43. In *Times Film,* petitioner, wishing to exhibit the film "Don Juan" without submitting it to the municipal censorship board, brought a federal court action to enjoin the required submission. This Court pointed out that "there is not a word in the record as to the nature and content of 'Don Juan'," but that petitioner felt "that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination." 365 U.S. at 46. In that setting this Court said that the "broad justiciable issue" posed by the case was "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." *Ibid.* The present case, on the other hand, is a criminal prosecution for exhibiting a film—"Revenge at Daybreak"—which, as was noted by the Maryland Court of Appeals, "the

State conceded . . . would have been approved had it been submitted for licensing" (R. 80).

II. Motion pictures are a medium of expression protected by the First and Fourteenth Amendment from governmental interference. *Burstyn* v. *Wilson*, 343 U.S. 495. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. An administrative system for censoring motion pictures prior to their exhibition "admittedly . . . imposes a previous restraint . . .". *Times Film Corp.* v. *Chicago, supra*, at 46. Assuming, *arguendo* the continued vitality of the holding in *Times Film* that, because of the special nature of the medium, prior restraints may be permissible with respect to motion pictures which are outside the scope of constitutional protection, the holding carries with it an obvious corollary: The state can neither restrain nor punish the exhibition of a constitutionally protected motion picture. *A Quantity of Books* v. *Kansas*, 84 S. Ct. 1723, 1727 (concurring opinion of Stewart, J.) *cf. Jacobellis* v. *Ohio*, 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.). "Revenge at Daybreak", the film shown by appellant, concededly falls within the category of protected motion pictures.

Although the censor's power to restrain the exhibition of all or part of a film is plainly circumscribed by the "dim and uncertain line" beyond which lies the constitutionally protected domain (*Bantam Books* v. *Sullivan*, 372 U.S. 58, 66), it may be thought to be arguable that the state's asserted power to make crim-

inal the public screening of a film which has not been submitted for censorship, embraces (when used as an appropriate adjunct to a valid censorship system) not only unprotected films but films whose constitutional status is initially unknown. If the state is to be deemed entitled to fashion such a crime, the defendant unquestionably must be permitted to show, by way of defense, the constitutionally protected character of the motion picture he is charged with having exhibited. See Point V, *infra*. In any event, however, the suggested rationale underlying such a criminal prosecution can avail the State of Maryland nothing in the present instance; for here the state has not only not sought to show the impropriety of "Revenge at Daybreak", it has conceded that the film is an entirely proper one. Maryland's position is, therefore, cognate with that of the United States in *Ex parte Endo*, 323 U.S. 283, 302: "The authority to detain a citizen . . . as protection against espionage or sabotage is exhausted at least when his loyalty is conceded." Since the prosecution of appellant "is not reasonably related to any proper governmental objective" (*Bolling* v. *Sharpe*, 347 U.S. 497), his conviction must be reversed.

III. Making it a crime to show an unlicensed film is intended to funnel all films into the hands of the Maryland Board of Motion Picture Censors. But, at least as applied to concededly permissible films, requiring their submission to the Board of Censors serves no valid governmental purpose. On the contrary, it serves two invalid purposes: One is to tax the exercise of the right of free expression. The other is to delay—perhaps for an extended time—the exer-

cise of the right. The magnitude of these interferences with every film submitted is only underscored by the fact that the Board of Censors, in a typical recent year, found 99.5% of all films submitted to be wholly unobjectionable. The Constitution does not authorize the imposition of infringements so numerous and pervasive as these in order to accomplish ends which are so disproportionately minute. *Shelton* v. *Tucker,* 364 U.S. 479, 488. Moreover, since the actual need for any system of prior restraint of films seems so flimsy, to impose this burden on films and not on other media of expression appears to work a denial of the equal protection of the laws.

IV. Even if Maryland could constitutionally require appellant to submit "Revenge at Daybreak" to a proper censorship system, this system is not a proper one: (1) the substantive standards are virtually identical with those invalidated in *Kingsley International Pictures* v. *Regents,* 360 U.S. 684; and (2) the judicial procedures lack the speed and safeguards of those sustained in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436. Appellant is entitled to challenge these standards and procedures. *Staub* v. *Baxley,* 355 U.S. 313; *Thornhill* v. *Alabama,* 310 U.S. 88.

V. In defending against a criminal prosecution for showing an unsubmitted film, appellant was constitutionally entitled to demonstrate, by way of complete defense, the conceded fact that "Revenge at Daybreak" falls within the ambit of the First Amendment's protection. This is implicit in the views of Professor Freund (4 *Vand. L. Rev.* 533, 539) and Pro-

fessor Bickel (*The Least Dangerous Branch*, pp. 137-38), explicit in the *Times Film* dissent (365 U.S. at 48), and follows necessarily from *Staub* v. *Baxley*, *supra*; *Thornhill* v. *Alabama*, *supra*; and *Gelling* v. *Texas*, 343 U.S. 960.

ARGUMENT

I

The Maryland Court of Appeals, like the Baltimore Criminal Court, erred in concluding that the instant case is controlled by *Times Film Corp.* v. *Chicago*, 365 U.S. 43.

The Maryland Court of Appeals agreed with the Criminal Court of Baltimore that appellant's federal claims were governed, adversely to appellant, by this Court's decision in *Times Film Corp.* v. *Chicago*, 365 U.S. 43. The State of Maryland has adhered to this view in its "Motion to Dismiss or Affirm" the instant appeal. Appellant submits that in sustaining his conviction "on the authority of the *Times Film* case," (R. 83, 197 A. 2d, at 235), the Court of Appeals failed to recognize that *Times Film* and the instant prosecution are vastly different—constitutionally different—cases.

Times Film was a civil action in equity initiated by a motion picture distributor seeking to challenge Chicago's system of municipal censorship of motion pictures. Plaintiff had tendered to the censorship officials the required license fee, but had declined to submit for censorship the film ("Don Juan") which plaintiff sought to exhibit. When the censorship of-

ficials refused to issue a permit authorizing plaintiff to exhibit the film, plaintiff sought a federal court order compelling issuance of the permit, or, in the alternative, enjoining enforcement of so much of the municipal code as prohibited exhibition of a film without permission of the censoring officials. Plaintiff's position was that it was entitled to exhibit the film in question, whatever its content, subject only to subsequent criminal prosecution under Illinois' laws against pornography. The federal district court and the federal court of appeals concluded that the case posed no justiciable issue. This Court, on certiorari, found that there was a justiciable issue, and addressed itself to the merits. And this Court carefully delineated the issue before it (365 U.S. at 46):

> Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone we decide.

Having so delineated the issue, this Court resolved it adversely to plaintiff (365 U.S. 46, 47):

> . . . [T]here is not a word in the record as to the nature and content of "Don Juan." We are left entirely in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. . . .

> Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, §470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment. . . . Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree.

The instant case comes before this Court in an entirely different posture, and presents issues of very different dimension. In the instant case, the moving party is the state, which seeks to sustain a criminal judgment against appellant. In the instant case, appellant does not claim—as petitioner claimed in *Times Film*—"complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" 365 U.S. at 46.[3] In the instant case it cannot be said, as this Court properly said in *Times Film*, that "there is

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[3] That this Court's statement of the issue in *Times Film* accurately reflects the position asserted by petitioner before this Court is evident from the following colloquies which took place on the oral argument in *Times Film*:

> Justice Harlan: What you are saying, I gather, is that on the assumption this film which we haven't got is the hardest sort of hard core pornography, that the State of Illinois cannot deal with you through a licensing program, but that it has got to let you exhibit and then prosecute you if you violate the criminal law; is that it?

not a word in the record as to the nature and content" of the film sought to be exhibited, or that the members of this Court "are left entirely in the dark in this regard, as were the city officials and other reviewing courts." 365 U.S. at 46, 47. In the instant case, the film in question—"Revenge at Daybreak"—has been publicly exhibited (R. 5, 17); is in the record (R. 6); has been viewed by the trial court (R. 20); and is available for viewing by this Court. Moreover, the film was viewed by the Censor Board's chief reviewer, Mrs. Holland, at the time of its public exhibition. At appellant's trial, Mrs. Holland apparently would have testified, had she been permitted to do so, that "Re-

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Mr. Bilgrey: Mr. Justice Harlan, if I may be permitted to expand on that, we are saying that to a certain degree that we are not suggesting what remedies the state can have.

Justice Harlan: Isn't that your whole case? Isn't that what you are here about?

Mr. Bilgrey: Well, I believe that that is a correct statement, Mr. Justice Harlan. . . . (Transcript of oral argument, pp. 11-12.)

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Justice Frankfurter: I am not suggesting any presumption regarding this particular undisclosed film. What I am suggesting is a legal proposition, if I follow your argument at all, that for purposes of the question before the Court, it is a matter of indifference what the character or quality or message or whatever you may say about a film, it is a matter of indifference.

It may be at once the most notable and noble picture, or it may be the vilest of pictures. From the point of view of the question before the Court, that is a matter of indifference.

Mr. Bilgrey: I think it is. I think that is correctly stated, Mr. Justice Frankfurter.

Justice Frankfurter: Very well. (Transcript of oral argument, p. 25)

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Justice Whittaker: I am asking you—I am not hypothetical: I am on concrete cases here.

I am asking you if by this very suit you are not asking

venge at Daybreak" violated none of the standards of the Maryland law (R. 11); and the prosecutor acknowledged that Maryland did not contend that the film was obscene or that it would not have been approved by the Board if submitted for licensing. Indeed, on appeal, as the Court of Appeals itself observed, the State of Maryland acknowledged that the film in question "*would have been approved had it been submitted for licensing.*" (R. 80), 233 Md. at 502, 197 A.2d at 234 (emphasis added.)

In short, in the instant case the State of Maryland has visited criminal punishment on one whose sole act has been to exhibit a film which, *as the state concedes,* the state was without legal power to proscribe. Thus the very issue tendered and decided in *Times Film*—"whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" (365 U.S. at 46)[4]—is absent here. Here the State of

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the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No; and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. . . . (Transcript of oral argument, p. 86)

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See also pp. 5, 6 and 8 of the transcript of oral argument.

[4] Subject only to "the invocation of criminal process under the . . . pornography statute . . . and then only after a transgression." 365 U.S. at 49. This Court has since reiterated the limited nature of the *Times Film* decision: "The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.*" *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 n. 10. (emphasis by this Court).

Maryland seeks to punish appellant for exhibiting a motion picture which the state has conceded to be unobjectionable.

Times Film—the authority relied on as controlling by the two courts below—plainly does not support appellant's conviction. Maryland, in its "Motion to Dismiss or Affirm", has elected to stand on the same untenable ground, and no other. Therefore, appellant's conviction should be set aside.

II

Because "Revenge at Daybreak" is concededly a constitutionally protected film, appellant's conviction for publicly exhibiting that film cannot be sustained.

It is no longer open to dispute that motion pictures, like speech and the press, are a medium of expression protected by the First and Fourteenth Amendments. *Burstyn* v. *Wilson,* 343 U.S. 495; *Smith* v. *California,* 361 U.S. 147. But as with the spoken and written word, so too with films, there is a very minute sector of constitutionally unprotected expression—*e.g.,* obscenity, and direct incitement to immediate rebellion or other grave crime. Within that very minute sector, expression may be punished (*Feiner* v. *New York,* 340 U.S. 315; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568), and apparently may even, under extraordinary circumstances, be subject to forms of prior restraint. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436. It is evident, however, that only the most rigorously structured and administered systems of prior restraint can pass constitutional muster. "Any system of prior

restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. This Court in *Times Film* of course recognized that a governmental mechanism under which motion pictures are licensed prior to public exhibition "imposes a previous restraint." 365 U.S. at 46. But, in view of what a majority of this Court held to be the special nature of the motion picture medium, injunctive relief preventing enforcement of the licensing system with respect to "any . . . kind of motion picture" whatever its "nature and content" was denied. As this Court recently put it in *Bantam Books, supra*, at 70 n. 10, the decision in *Times Film* was confined to the question "whether a prior restraint was necessarily unconstitutional *under all circumstances*" (emphasis by this Court).

Times Film did not, of course, sustain the validity of a system of administrative licensing of motion pictures as applied in any particular context. Appellant, with all deference, questions the soundness of *Times Film* to the extent that it is subject to the construction that a system of licensing constitutionally protected films in advance of their exhibition can be validly enforced. Nevertheless, assuming, *arguendo*, the continued vitality of *Times Film*, appellant submits that what *Times Film* means—and all it could conceivably mean, compatibly with the First and Fourteenth Amendments—is that a system of prior censorship, containing appropriate procedural safeguards, may be permissible with respect to films which are demonstrably outside the scope of constitutional protection. So understood, the holding carries with it

a necessary corollary: government cannot restrain, just as it cannot punish, the exhibition of constitutionally protected films.[5] The essential and manifest point was recently made by Mr. Justice Stewart, concurring in *A Quantity of Books* v. *Kansas,* 84 S. Ct. 1723, 1727: having concluded that "the books . . . involved were not hard-core pornography," Mr. Justice Stewart added, "Therefore, I think Kansas could not by any procedure constitutionally suppress them, any more than Kansas could constitutionally make their sale or distribution a criminal act." Cf. *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.)

As applied to appellant's case, the thrust of these observations seems plain. Since "Revenge at Daybreak" is, by the state's own concession, neither obscene nor in any other sense outside the realm of constitutional protection, Maryland "could not by any procedure constitutionally suppress" the film, nor could Maryland "constitutionally make" exhibition of the film "a criminal act." Wherefore, appellant's conviction cannot stand.

Nor does Maryland's case draw strength from an attempt to define the offense charged in a different way—as by arguing that appellant's crime lay in exhibiting "Revenge at Daybreak" without submitting the film to the Maryland Motion Picture Censor Board for that Board's prior approval of the proposed showing. For here, to repeat, appellant's film

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[5] "But our holding in *Roth* [*Roth* v. *United States,* 354 U.S. 476] does not recognize any state power to restrict the dissemination of books which are not obscene" *Smith* v. *California,* 361 U.S. 147, 152.

is conceded to be one which the Board could not have lawfully denied appellant the right to exhibit. And so the state is, presumably, remitted to contending that it was entitled to require the footless act of prior submission—with its attendant costs to appellant in fees, and in delay (see *infra,* Point III)—merely as a way of assuring that other films, the content of which is unknown, would continue to be funneled through the Motion Picture Censor Board in the manner contemplated by Article 66A, §2, of the Maryland Code.

If Maryland could persuasively argue that creation of the crime of non-submission is an appropriate adjunct to a valid system of censorship, it would still be constitutionally necessary to permit appellant to show, as matter of defense, the constitutionally protected nature of the film he exhibited. See *infra,* Point V.

At all events, once it is granted that appellant's film was constitutionally protected, there is no further basis for the argument that penalizing appellant for exhibiting a non-submitted film legitimately reenforces a valid censorship system. The argument fails, as a comparable argument failed, in the face of claims of personal liberty on a par with the rights protected by the first Amendment, in *Ex Parte Endo,* 323 U.S. 283. There, it will be recalled, the United States sought to resist the release from a World War II relocation center of an American citizen of Japanese ancestry whose loyalty the government conceded. Miss Endo could not be released, in the government's view, until a program for her planned relo-

cation in an approved area of the country had been arrived at: "The success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation. . . ." 323 U.S., at 297. But this Court held that Miss Endo was entitled to immediate release (323 U.S., at 302):

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.
>
> Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espion-

age or sabotage is exhausted at least when his loyalty is conceded.

In the instant case, even if we assume (as appellant does, for purposes of argument, though he would also challenge the assumption) that the claimed authority to exclude certain films in advance is justified, this authority, *and the claimed cognate authority to punish for exhibiting an unlicensed film,* are exhausted when the legitimacy of the film sought to be exhibited is conceded. At that point, both the authority to restrain and the authority to punish are no longer "reasonably related to any proper governmental objective." *Bolling* v. *Sharpe,* 347 U.S. 497, 500. To hold otherwise—to permit appellant's conviction to stand—would be to accord appellant the curious honor of being the first American in the nation's history who was branded a criminal for exercising rights conceded to be indubitably his under the First Amendment.

III

To force appellant to submit his concededly permissible film for censorship, as the price of avoiding criminal prosecution, would be to force appellant to expend both money and time to purchase a privilege of expression which, under the Constitution, belongs to appellant as a matter of free right.

The constitutional right at issue in the instant case is the right of free speech. When exercise of the right is contingent on payment of a fee, and then only at some future date, what was once a right has

degenerated into a privilege. And the speech is no longer free.

(1) The cost to appellant in dollars:

If appellant had submitted "Revenge at Daybreak", the film he proposed to exhibit, to the Motion Picture Censor Board, he presumably would have received a license to show the film and would thereby have insulated himself against the present criminal prosecution. But to qualify himself to receive the benison of a license appellant would have had to pay a fee of approximately thirty dollars (R. 16). Moreover, even after getting the Board's official seal of approval for his film, appellant would have had to pay a further fee if he had wished at a future date to exhibit a duplicate print of the same film. Art. 66A, Sec. 11, *supra,* pp. 4, 5 of Brief.

Assuming the continued vitality of *Times Film,* it may be arguable that Maryland can exact a license fee approximately commensurate with the administrative cost of maintaining a valid system of prior censorship. But this means, of course, that the state is powerless to exact a money fee for a permit to exhibit a film which is known to be uncensorable—*i.e.,* a film with respect to which it is known *in limine* that the Censor Board can have no role to play.

Thus, to hypothesize a concrete example, if on July 1, 1964, appellant had proposed to exhibit "The Lovers" at the Rex Theatre in Baltimore, and if nobody had sought to exhibit that film in Maryland prior to that date, it cannot be seriously urged that the Censor Board would be entitled to charge appellant

a fee for granting him permission to exhibit a film determined by this Court, on June 22, 1964, in *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, to be constitutionally protected.[6] (In actual fact, appellant, presumably on payment of the prescribed fee, sought a permit to exhibit "The Lovers" in Maryland some years back; the film was rejected by the Censor Board; after the "burdensome and onerous process" of appeal to the Maryland courts—a process which "takes a great deal of time, a great deal of money"—appellant succeeded in getting the decision of the Censor Board set aside. (R. 15).

By the same token, there is simply no warrant in the Constitution for the Censor Board's actual practice, required by the governing statute, of charging a fee for a permit to show the duplicate of an already approved film. Here—as in the hypothesized example of "The Lovers"—the fee obliterates with a dollar sign the free exercise of unquestioned First Amendment rights. It thus flatly contradicts this Court's unbroken line of cases striking down taxes imposed on the exercise of rights of speech and the press. *Grosjean* v. *American Press Co.,* 297 U.S. 233; *Jones* v. *Opelika,* 319 U.S. 103; *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Follett* v. *McCormick,* 321 U.S. 573.

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[6] Cf. *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585, appeal denied 348 U.S. 979, involving denial of a license to the motion picture "The Miracle" on grounds of claimed obscenity, *subsequent to* this Court's reversal in *Burstyn, supra* of the New York ban on "The Miracle" as "sacrilegious". "Vindication by the courts of *The Miracle* was not had until five years after the Chicago censors refused to license it. And then the picture was never shown in Chicago", *Times Film, supra,* dissenting opinion of Mr. Chief Justice Warren, at 31.

Precisely the same considerations govern appellant's supposed obligation to submit "Revenge at Daybreak" for licensing and to pay the demanded fee as a predicate to receiving the license. To the extent that *Times Film* can be regarded as giving doctrinal underpinning to a procedure akin to that employed by Maryland, the case is relevant only with respect to films as to which the censoring "officials and the . . . reviewing courts" are "entirely in the dark." 365 U.S. at 46-7. But in the present case appellant wished to exhibit a film conceded by Maryland to be unobjectionable. Moreover, Maryland has known the film to be unobjectionable at least since it was exhibited by appellant on the occasion which gave rise to this litigation. For on that occasion the film was viewed by Mrs. Holland, chief reviewer (and one-time member) of the Board, (R. 7-8), who views all submitted films and who convenes the Board to view only those films she questions (R. 40). And Mrs. Holland, had she been permitted to answer defense counsel's questions, apparently would have testified at trial that the film violated none of the Maryland statute's standards (R. 11). If, therefore, on the day following appellant's exhibition of the film at the Rex Theatre, appellant had sought a license to authorize further showings, the Censor Board would have been no more entitled to exact a fee for processing "Revenge at Daybreak", which Mrs. Holland had already viewed with approval, than, in the hypothesized instance, the Censor Board would be entitled to exact a fee for a current license for "The Lovers".

It may be argued, however, that the real question is whether appellant could have been constitutionally required to pay a fee as the price of a permit if he

had sought the Censor Board's leave to show "Revenge at Daybreak" the day before he exhibited and Mrs. Holland saw the film. At that point (so the argument would presumably run) Maryland had no information about the film and could, therefore, have properly imposed on appellant all the burdens incident to establishing the film's purity. But the surface plausibility of the argument barely conceals the essential anachronism which inheres in systems of administrative licensing of motion pictures that put the initial and costly burden of proof entirely on the would-be exhibitor: As Alexander M. Bickel has put the matter (*Bickel, The Least Dangerous Branch*, p. 137):

> The state cannot ordinarily arrest an individual or search his papers or effects without first making out probable cause that he has committed an illegal act, and it ought to have no greater power over the product of an individual's mind, which a motion picture may sometimes turn out to be. It is strange and unaccustomed that the exhibitor of a motion picture should have the burden of coming forward with evidence of "innocence" while the censor need prove nothing at this stage.

Of course the oft-asserted excuse for this extraordinary procedural turnabout—and for the attendant constraints thus placed on the free and immediate exercise of fundamental constitutional rights—is the special character of the motion picture medium. Presumably this excuse should be supportable by data tending to demonstrate that, with alarming frequency, films submitted for censorship are in fact censorable. But the data of Maryland's own Censor Board shows

just the opposite to be true. For example, according to the Board's forty-fifth annual report, in "the fiscal year ending June 30, 1961 . . . the Board examined and processed a total of 7,074 subjects . . . Of these 7,074 subjects, 7,045 were approved without modification and 27 were modified in part, and two films were rejected in their entirety (R. 66). Thus, better than 99.5% of the films examined were approved without incident[7]—except that charges in excess of $66,000 were imposed on the motion picture industry, thereby enabling the Maryland Board to continue to turn the modest annual profit which has netted the state over half a million dollars in forty-five years of censorship (R. 66). So gross an imposition for so microcosmic an end is surely impermissible: "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

The experience of the Maryland Censor Board not only establishes that Maryland's intrusion on the First Amendment rights of motion picture exhibitors is indefensibly disproportionate to any supposed community need for a system of prior restraint of motion pictures. It also shows that the alleged special character of the motion picture medium, which is said to support a system of prior restraints for that medium which this Court has not sanctioned as to other media

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[7] This is, of course, not to be understood as meaning that the Censor Board is invariably right in its adverse judgment of the tiny fraction it modifies or rejects. Appellant's experience with "The Lovers" belies this. And see the other Maryland cases cited *infra*, p. 32.

of expression (*Times Film, supra; Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 70 n. 10), does not have as its corollary any such distinctive hazard as would tend to justify the special burden cast upon the motion picture medium. In short, singling out motion pictures as the single permissible target of a system of prior restraint poses a major problem of denial of the equal protection of the laws. As to motion pictures exhibited via the air waves, see *Allen B. Dumont Labs.* v. *Carroll,* 184 F. 2d 153 (C.A. 3, 1950) cert. den. 340 U.S. 929.

Viewed in this context, it is evident that what Maryland sought to do in the instant case—through the *in terrorem* impact of its criminal process, waiting in the wings—was to coerce appellant into payment of a fee to subsidize a state administrative procedure which was at least as to appellant, constitutionally unjustifiable.

The thirty dollars which would have been exacted of appellant, had he submitted his film, would have been an inspection fee taken from him at the toll gate before he could travel the highway beyond. But, in appellant's case, it is conceded that appellant's vehicle—"Revenge at Daybreak"—was, constitutionally speaking, without blemish. Wherefore, appellant was constitutionally entitled to travel the highway without charge.

Needless to add, this conclusion is not altered by the fact that a payment of only thirty dollars (together with submission of the film) would have saved appellant the criminal penalties now sought to be visited upon him. In *Follett* v. *McCormick, supra,* the daily license cost but a dollar; and an entire year's

license could have been had for fifteen dollars. Indeed, as Madison insisted in his memorable Remonstrance against money exactions to support religion, "it is proper to take alarm at the first experiment on our liberties. . . . The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever." See *Everson* v. *Board of Education,* 330 U.S. 1, 33, n. 29 (dissenting opinion). The First Amendment knows no rule of *de minimis.*[8]

(2) The cost to appellant in time:

Rights of free expression, like rights to the equal protection of the laws, are "personal and present." *McLaurin* v. *Oklahoma,* 339 U.S. 639. To delay rights of free expression, as to delay the claims of justice, is to deny them. Cf. *Staub* v. *Baxley,* 355 U.S. 313; *Niemotko* v. *Maryland,* 340 U.S. 268; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State,* 308 U.S. 147; *Lovell* v. *Griffin,* 303 U.S. 444.

Had appellant submitted "Revenge at Daybreak," a concededly permissible motion picture, to the Motion Picture Censor Board, that Board would, under Rule 4 of its Rules, have consumed between two and three days in reaching the fore-ordained conclusion that appellant was constitutionally entitled to exhibit the motion picture to the public (R. 57).

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[8] Were it otherwise, it could be argued that the fact that, in the instant case, appellant was only fined twenty-five dollars would deprive him of standing to appeal to this Court. But see *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Thompson* v. *Louisville,* 362 U. S. 199.

Two-to-three days of delay in exhibiting a motion picture may be a tolerable burden where it served some arguable valid state purpose—where, for example, two or three days must be consumed in pursuing censorship procedures whose validity is supported by this Court's holding in *Times Film*. But where, as here, it is manifest that with respect to a particular motion picture no review procedure is needed, or can constitutionally be imposed, then any significant delay—like any monetary exaction—becomes an unconstitutional obstacle to the exercise of First Amendment rights.

The more so is this true when it is recognized that the two-to-three days required by the Motion Picture Censor Board presumes that the Board will recognize the innocence of each unobjectionable film it processes. The actual fact is to the contrary. Because the Motion Picture Censor Board is a board of censorship, it tends to censor.[9] And it tends to censor films which are, in the perspective of the law, beyond its reach. But before the law catches up with the Board—as the Maryland Court of Appeals did, for example, in *State Board of Motion Picture Censors* v. *Times Film*, 212 Md. 454, 129 A.2d 833; *United Artists* v. *Maryland State Board of Censors*, 210 Md. 586, 124 A.2d 292; and *Fanfare Films, Inc.* v. *Motion Picture Censor Board*, 234 Md. 10, 197 A.2d 839. — not days but years go by in which an exhibitor's constitutional rights have been irretrievably lost.

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[9] Section 3 of the statute provides that the Censor Board shall be composed of three Maryland citizens "well qualified by education and experience to act as censors. . . ." (App. A, p. App. 2, *infra*).

In this case Maryland sought to use its criminal process as a device to compel appellant to undergo the concededly useless process of censorship—a process which could subserve only the ends of augmenting state revenues[10] and delaying appellant in the free exercise of his constitutional rights. Maryland sought, through the threat of criminal prosecution, to compel appellant to submit his film to censorship. Appellant would not submit, and therefore he was prosecuted. His conviction cannot coexist with the First and Fourteenth Amendments.

IV

Assuming appellant could have been required to submit his film to a valid censorship system, the standards and appellate procedures contained in the Maryland system are constitutionally defective.

In *Times Film* this Court noted that the particular standards contained in the Chicago censorship ordinance "are not challenged and are not before us." 365 U. S. at 46. In the instant case, appellant at trial and since has challenged the entire structure of Maryland's censorship system. And this—notwithstanding the contrary view of the court below—appellant is fully entitled to do: "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Thornhill* v. *Alabama,* 310 U. S. 88, 98. As Mr. Justice Whittaker put the mat-

[10] Had appellant's film been held objectionable by the Board, he would also have had to incur substantial added costs in appellate litigation—as, of course, he has had to on appeal from the instant conviction.

ter, speaking for the Court, "The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub* v. *Baxley*, 355 U. S. 313, 319. *Accord*: *Thomas* v. *Collins*, 323 U. S. 516.

The invalidity of the statutory standards sought to be administered by the Maryland Censor Board goes to the heart of the Maryland censorship system:

Section 6(a) of the Maryland statute requires the Board to:

> Approve and license such films or views which are moral and proper; and . . . disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes.

Section 6(c) recites that:

> For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

On the face of the statutory language, it is hard to conceive of a way in which these standards could be so rigorously administered as to confine the Censor Board to the "hard-core pornography" which is all that Maryland "could . . . by any procedure constitu-

tionally suppress . . . ." *A Quantity of Books* v. *Kansas,* 84 S. Ct. 1723, 1727 (concurring opinion of Stewart, J.) and to which "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited . . ." *Jacobellis v. Ohio,* 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.).

However, we are not remitted to conjecture as to the invalidity of Maryland's statutory standards. For in *Kingsley International Pictures* v. *Regents,* 361 U. S. 684, this Court considered and found constitutionally defective New York's ban on "Lady Chatterley's Lover"—a ban which was predicated on virtually identical statutory language:

> . . . the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.[11]

The crucial substantive invalidity of the Maryland censorship system is matched by the system's procedural defectiveness. On this score the central problem is that the informal—almost casual—non-adversary administrative mechanism is coupled with (1) provisions for judicial review which are woefully—

[11] The state seems to have conceded below that a portion of the statute is unconstitutional, Brief of Appellee in the Court of Appeals of Maryland, at 21-22.

unconstitutionally—time-consuming, and (2) the coercive criminal sanctions for non-submission on which appellant has been impaled in the instant case. The defective Maryland procedures precisely emulate the Chicago procedures succinctly dissected by Mr. Chief Justice Warren in his dissent in *Times Film*. The *Times Film* majority, not finding the specifics of the Chicago ordinance at issue, had no occasion to consider the Chicago procedures. But the dissenters, speaking through Mr. Chief Justice Warren, canvassed the Chicago procedures with care, comparing them unfavorably to those endorsed by the Court in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436. The following words of the Chief Justice are directly transposable to the Maryland statute (*Times Film, supra*, 365 U. S. at 65, 66).

> The statute in *Kingsley* specified that the person sought to be enjoined was to be entitled to a trial of the issues within one day after joinder and a decision was to be rendered by the Court within two days of the conclusion of the trial. The Chicago plan makes no provision for prompt judicial determination. In *Kingsley*, the person enjoined had available the defense that the written or printed matter was not obscene if an attempt was made to punish him for disobedience of the injunction. The Chicago ordinance admits no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained.

V

Appellant was constitutionally entitled to show, by way of defense to the instant criminal prosecution, that "Revenge at Daybreak" was a constitutionally protected film.

The Maryland Court of Appeals noted the state's concession that "Revenge at Daybreak" would have been licensed if submitted for censorship. The Court of Appeals noted that concession "Parenthetically." That concession—which meant that the film exhibited by appellant was constitutionally protected—should have called for reversal of appellant's conviction forthwith.

In *Kingsley Books* v. *Brown,* 354 U.S. 436, this Court, speaking through Mr. Justice Frankfurter, rejected the claim that New York's statutory scheme for enjoining the sale and distribution of obscene books was necessarily unconstitutional simply because it was, manifestly, a system of "prior restraint." Mr. Justice Frankfurter turned to a then recent article by Paul Freund as authority for the proposition that mere invocation of the term "prior restraint" is not an automatic solvent of constitutional problems. The Justice quoted Professor Freund's observation that, "What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." Freund, *The Supreme*

Court and Civil Liberties, 4 *Vand. L. Rev.* 533, 539 (1951).[12]

Just before the sentences quoted by Mr. Justice Frankfurter, Professor Freund had ventured a "particularistic analysis" which bears with compelling impact on the issues posed by the instant case. Professor Freund put the matter this way (Freund, *supra*, 4 Vand. L. Rev. at 539):

> Suppose that the individual offender, rather than ultimately losing, eventually prevails on a full hearing of the constitutional issues. In a criminal trial he would of course suffer no punishment. In an injunctive or administrative proceeding, where a restraining order or temporary injunction has been issued against him or a permit withheld, but where a final injunction is ultimately denied or a permit granted, there is the serious problem of penalties for interim violations. If disobedience of the prior order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute. To

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[12] In *Niemotko* v. *Maryland*, 340 U.S. 268, Mr. Justice Frankfurter, concurring, had observed at 282, 283: "What is the method to achieve such ends as a consequence of which public speech is restrained or barred? A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like. *Again, a sanction applied after the event assures consideration of the particular circumstances of a situation.*" (emphasis added) And in *Kingsley Books*, *supra*, this Court speaking through Mr. Justice Frankfurter, held, at 441: "To be sure, the limitation [of speech and the press] is the exception; it is to be closely confined to preclude what may fairly be deemed licensing or censorship."

> the extent, however, that local procedure allows such a defense to be raised in a contempt proceeding, the special objection to prior restraint growing out of the problem of interim activity is obviated.

Writing after the decision in *Times Film*, and addressing himself specifically to the question of movie censorship, Professor Bickel built upon Professor Freund's "particularistic analysis" of a decade before (*Bickel, The Least Dangerous Branch*, pp. 137-38):

> The most crucial present-day difference between prior restraints and subsequent punishments concerns what happens to the film while litigation takes its course. If it were necessarily true that a film may be exhibited—at the defendant's peril, to be sure, but nevertheless exhibited—throughout the period of criminal litigation and appellate judgment, while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. Mr. Freund, for example, has strongly urged that the act of disobeying the censor and showing the film without a license should be held not to be a punishable offense if the exhibitor wins the ultimate litigation. This suggestion would equalize matters.

The view espoused by Professor Freund, and endorsed by Professor Bickel, should entail the corollary view that one who declines to submit to censorship should also prevail if, in the resultant criminal

prosecution, the state cannot demonstrate the impropriety of the exhibited film. And the validity of this corollary is, of course, underscored by the view of the *Times Film* dissenters that the Chicago ordinance was constitutionally defective for the reason that, *inter alia,* it admitted "no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained." 365 U.S. at 66. Indeed, appellant submits that this corollary follows inexorably from this Court's holdings in *Staub* v. *Baxley, supra,*[13] *Thornhill* v. *Alabama, supra, Thomas* v. *Collins, supra*—and, as to films, from this Court's *per curiam* reversal in *Gelling* v. *Texas,* 343 U.S. 960.

In any event, however, the First Amendment must compel this corollary where, as in the instant case, the state not only does not assert the impropriety of the exhibited film but *concedes the contrary.* To acknowledge appellant's constitutional right of free expression and to stamp him a criminal for exercising that right would take us back to a never-never land of jurisprudence unimagined even by the great author of *Areopagitica.*

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[13] For example, this Court there pointed out, at 321:

"It will be noted that appellant was not accused of any act against the peace, good order or dignity of the community, nor for any particular thing she said in soliciting employees of the manufacturing company to join the union. She was simply charged and convicted for 'soliciting members for an organization without a Permit' ".

CONCLUSION

Wherefore, it is respectfully urged that the judgment below be reversed.

Respectfully submitted,

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September, 1964

Appendix A

ACT OF 1922, CHAPTER 390

(As amended by the Acts of the General Assembly of Maryland of 1927, 1929, 1939, 1941, 1945, 1947, 1955 and 1960.)

1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, 1; 1939, 1; 1924, 1; 1922, ch. 390, 1; 1941, ch. 28.)

2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, 2; 1939, 2; 1924, 2; 1922, ch. 390, 2.)

3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective terms to be designated by the Governor. (An. Code, 1951, 3; 1939, 3; 1924, 3; 1922, ch. 390, 3; 1939, ch. 430.)

4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, 4; 1939, 4; 1924, 4; 1922, ch. 390, 4.)

5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, 5; 1924, 5; 1939, 5; 1924, 5; 1922, ch. 390, 5.)

6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) Board to examine, approve or disapprove films.—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) What films considered obscene.—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) What films tend to debase or corrupt morals. —For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) What films tend to incite to crime.—For the purposes of this article, a motion picture film or view

shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. (An. Code, 1951, 6; 1939, 6; 1924, 6; 1922, ch. 390, 6; 1955, ch. 201.)

7. Certificate of approval or license.

Upon each film that has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. ....." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statements shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar

statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by 11 of this article, to issue a duplicate certificate of approval. Any certificate or license issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, 7; 1939, 7; 1924, 7; 1922, ch. 390, 7; 1929, ch. 555, 7.)

8. Record of Examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, 8; 1939, 8; 1924, 8; 1922, ch. 390, 8.)

9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, 9; 1939, 9; 1924, 9; 1922, ch. 390, 9; 1945, ch. 66.)

10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall annually give corporate surety bond to the State of Maryland in such sum as the State Comptroller may prescribe, with condition that he faithfully perform the duties of his office and account for all funds received under color of his office. (An. Code, 1951, 10; 1939, 10; 1924, 10; 1922, ch. 390, 10; 1927, ch. 46; 1945, ch. 400.)

11. Fees.

For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages

sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of one dollar and twenty-five cents ($1.25) for the approval of every duplicate of one thousand feet (1,000') or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of two dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of one dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of 7 of this article; and the Board shall account for and pay all fees received by it into the State treasury. (An. Code, 1951, 11; 1939, 11; 1924, 11; 1922, ch. 390, 11; 1929, ch. 555, 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720.)

12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City or Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of

the members of the Board, each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, 12; 1939, 12; 1924, 12; 1922, ch. 390, 12; 1941, ch. 727; 1949, ch. 257; 1960, ch. 47.)

13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, 13; 1939, 13; 1924, 13; 1922, ch. 390, 13.)

14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to prevent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, 14; 1939, 14; 1924, 14; 1922, ch. 390, 14.)

15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with

any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such poster, banner, or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, 15; 1939, 15; 1924, 15; 1922, ch. 390, 15.)

16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, 16; 1939, 16; 1924, 16; 1922, ch. 390, 16.)

17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make

any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, 17; 1939, 17; 1924, 17; 1922, ch. 390, 17.)

18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employee of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, 18; 1939, 18; 1924, 18; 1922, ch. 390, 18.)

19. Notice of elimination or disapproval; re-examination; appeals.

If any elimination or disapproval of a film or view is ordered by the Board, the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of

appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals. (An. Code, 1951, 19; 1939, 19; 1924, 19; 1922, ch. 390, 19; 1955, ch. 201.)

20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, 20; 1939, 20; 1924, 20; 1922, ch. 390, 20.)

21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by 7 hereof or any similar certificate,

statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, 21; 1939, 21; 1924, 21; 1922, ch. 390, 20A.)

22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approved seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, 22; 1939, 22; 1924, 22; 1922, ch. 390, 21.)

23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, 23; 1939, 23; 1924, 23; 1922, ch. 390, 22.)

24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, 24; 1939, 24; 1924, 24; 1922, ch. 30, 23.)

25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract

when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, 25; 1939, 25; 1924, 25; 1922, ch. 477.)

26. Same—Waiver.

No waiver of the provisions of 25 shall be made so as to evade the provisions of said 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, 26; 1939, 26; 1924, 26; 1922, ch. 477.)